

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 2, 2010

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR; In Re: Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP48, PAL41, and PSD-TX-1138

Dear Mr. Trobman:

We have reviewed the exceptions to our Proposal for Decision (PFD) prepared in the above-referenced matter. At this time, we continue to stand by the findings, conclusions, and recommendations contained in the PFD.

Given our findings and conclusions, it is not surprising that the bulk of exceptions have come from the Applicant. Many of those exceptions misrepresent or mischaracterize our analysis and conclusions, or imply that our reasoning was based upon no factual foundation. Although we would ordinarily reply to make sure the Commission understood the basis of our recommendations, we find that the replies to exceptions filed by the other parties generally have addressed the misrepresentations or mischaracterizations. Those replies to exceptions present many of the same points we would otherwise make, so we feel no need to repeat those points at this time. Moreover, given the voluminous amount of material and briefing already presented to the Commission, we do not wish to add additional information unless we feel it is absolutely necessary. Therefore, our comments at this time are extremely limited.

In regard to whether the proposed CFB boilers are subject to a case-by-case MACT analysis, protestant Environmental Defense Fund (EDF) has responded to most of Applicant's exceptions, and the ALJs tend to agree with EDF's responses. However, one point that the parties have not adequately addressed, but which is raised by Applicant's exceptions, is the contention that petroleum coke was included in the definition of petroleum at the times relevant to the filing of the application—thus removing it from the industrial boiler MACT requirements. This assertion by Applicant raises the issue of whether—if petroleum coke was included in a relevant definition of petroleum at the time of

the filing of the application—the boilers burning petroleum coke would qualify as oil-fired EUSGU boilers subject to the case-by-case MACT analysis.¹ To date, the parties have not addressed this issue in detail. Rather, Applicant argues the point simply to show why the boilers could not have fallen under the industrial boiler MACT requirements, and Protestants argue that the rules have been set aside by virtue of subsequent court decisions, thus making petroleum coke-fired boilers potentially subject to the industrial boiler MACT requirements.

Moreover, at different points, Applicant appears to argue that the ALJs entirely disregarded EPA's intent when conducting our analysis. We disagree with that assertion, and it certainly was not our intent to do so. In fact, as we note in the PFD, a prior EPA memorandum signed off by both technical and legal departments of EPA concluded that petroleum coke was not even a fossil fuel. Thus, a petroleum coke-fired boiler was not even considered an electric utility steam generating unit. This memorandum existed and had not been set aside by EPA at the time it adopted its 2000 listing decision. Thus, to the extent that there was any intent by EPA to exclude petroleum coke-fired facilities (as alleged by Applicant), then such intent must also be read in the context of that EPA memorandum, because nothing in the EPA's listing decision would contravene it or indicate any other specific reason for excluding petroleum coke-fired facilities from the listing decision.

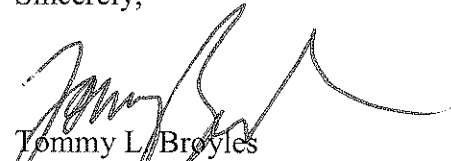
Other than these two points about the MACT analysis, the only other comments we wish to offer at this time relate to the Commission's handling of this matter in light of the language of TEX. HEALTH & SAFETY CODE ANN. § 382.0518(d) and (e). Despite the briefing by the parties, the ALJs still do not believe that the law is clear on how the Commission must handle this current application if it finds deficiencies. Thus, we make no recommendation on the specific outcome the Commission may decide, other than our conclusion that the permits may not be issued under the current evidentiary record. Moreover, the ALJs disagree strongly with Applicant's assertion that the Commission is not bound by the evidentiary record in this case in making its decision. The Administrative Procedure Act (APA) requires that administrative decisions be based upon findings of fact and conclusions of law, and that such findings of fact must be based only upon evidence in the record or matters officially noticed. *See* TEX. GOV'T CODE ANN. § 2001.141(c). Accordingly, the Commission must base its decision on the evidence in the record or on matters officially noticed.

Finally, to the extent the Commission remands the case for further proceedings to allow the Applicant to correct any deficiencies, the ALJs would modify their recommendation regarding the allocation of transcript costs. Namely, if the Commission remands to allow the Applicant to correct deficiencies, then the ALJs recommend that all transcript costs be allocated against the Applicant. As Protestants note, many of the deficiencies found by the ALJs were raised early on by Protestants. Thus, it would be unfair to require Protestants to pay some portion of the transcript costs if Applicant is now given additional opportunities to correct such deficiencies that Applicant was aware of and could have addressed prior to the hearing.


¹ Given that the definition of fossil fuel references petroleum and coal, EPA's listing decision for oil-fired boilers encompass boilers burning petroleum. Thus, if petroleum includes petroleum coke, a petroleum coke-fired boiler would arguably be an "oil-fired boiler" subject to the EPA's 2000 listing decision. But, the ALJs are aware of the various definitions of these terms in play at different time periods and thus a proper analysis of this issue requires more briefing from the parties.

With these limited comments, the ALJs rely on the PFD and replies to exceptions to adequately address the issues in this case. We will attend the Commission's open meeting and be prepared to answer any questions the Commissioners may have at that time.

Sincerely,



Tommy L. Broyles
Administrative Law Judge



Craig R. Bennett
Administrative Law Judge

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AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
(TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR
STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND
PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGE
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